Supreme Court, U.S.
FILED
AUG 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RECEIVED
AUG 23 1990
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 90-5395

PAUL GREGORY HOUSE,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR THE WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

CHARLES W. BURSON
Attorney General & Reporter

C. ANTHONY DAUGHTREY
Assistant Attorney General
(Counsel of Record)

450 James Robertson Parkway
Nashville, Tennessee 37243-0485
(615) 741-4492

Counsel for Respondent

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO. 90-5395

PAUL GREGORY HOUSE,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR THE WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The petitioner, Paul Gregory House, has filed a petition for writ of certiorari to the Supreme Court of Tennessee.[1] The respondent, the State of Tennessee, respectfully submits this response to the petition.

---

[1]Since the Supreme Court of Tennessee declined to accept jurisdiction of this case, the petition should be directed to the Court of Criminal Appeals of Tennessee. If the petitioner subsequently tenders a proper petition, the State asks that this response be deemed a response to that petition.

OPINION BELOW

The Opinion of the Court of Criminal Appeals of Tennessee is attached to the petition.

JURISDICTION

The judgment of the Court of Criminal Appeals of Tennessee was entered on December 15, 1989. On March 5, 1990, the Supreme Court of Tennessee denied the petitioner's application for permission to appeal. This Court granted the petitioner additional time in which to file this petition.

The petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. §1257.

QUESTIONS PRESENTED

I. Whether the mere possibility that the jury misconstrued sentencing instructions to require unanimous agreement on mitigating circumstances presents a substantial constitutional question.

II. Whether this Court should consider an issue raised for the first time in this petition.

STATEMENT OF THE CASE

The petitioner, Paul Gregory House, was convicted by a jury of murder in the first degree and sentenced to death by electrocution. The Supreme Court of Tennessee affirmed the conviction and sentence on direct appeal. State v. House, 743 S.W.2d 141 (Tenn. 1987).

On March 3, 1988, the petitioner filed a petition for post-conviction relief. Counsel was appointed and amended the petition to include additional grounds. The trial court rejected all issues and dismissed the petition.

The Court of Criminal Appeals of Tennessee affirmed the judgment on December 15, 1989. On March 5, 1990, the Supreme Court of Tennessee denied the application for an appeal by permission.

ARGUMENT

I. THE MERE POSSIBILITY THAT THE JURY MISCONSTRUED SENTENCING INSTRUCTIONS TO REQUIRE UNANIMOUS AGREEMENT ON MITIGATING CIRCUMSTANCES FAILS TO PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION.

The opinion of the Court of Criminal Appeals reflects that the petitioner preserved a single issue for review. Specifically, he claimed that the jury charge may have led the jury to believe that it could not give effect to any mitigating evidence unless all jurors agreed on the existence of a particular mitigating circumstance, citing Mills v. Maryland, 486 U.S. 367 (1988). The Court of Criminal Appeals affirmed the judgment, relying upon the Tennessee Supreme Court's holding in State v. Thompson, 768 S.W.2d 239, 252 (Tenn. 1989), that jury instructions which conform to the language and structure of the Tennessee death penalty statute do not require the jury to agree upon the existence of any mitigating circumstance. The petitioner then filed an application for permission to appeal which likewise preserved this single issue.

The Supreme Court of Tennessee denied the application for permission to appeal on March 5, 1990. That same date, this Court invalidated a capital sentencing scheme in which jurors were not allowed to consider mitigating evidence unless all jurors agreed upon the

existence of the mitigating circumstances. McKoy v. North Carolina, ___U.S.___, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). The petitioner merely asks this Court to apply this principle of law to the circumstances of his case.

This Court has fully examined this issue in two recent opinions. The petitioner asserts only that the courts of Tennessee erroneously applied these precedents. This claim would be better presented in a federal habeas corpus action, in which the district court may review this claim under the principles of Mills and McKoy, and will consider those issues which were exhausted on direct appeal.

Since the petitioner has failed to present a substantial question of federal constitutional law, the petition for the writ of certiorari should be denied.

II. THIS COURT SHOULD NOT CONSIDER AN ISSUE RAISED FOR THE FIRST TIME IN THIS PETITION.

In his second issue, the petitioner asserts that the Tennessee death penalty statute does not assign a standard for weighing mitigating factors against aggravating circumstances and does not assign a burden of proof. The petitioner has failed to present this issue to the appellate courts of Tennessee. He raises this claim for the first time in this petition.

This Court has appellate jurisdiction of final judgments or decrees. 28 U.S.C. §1257(a). Consideration of an issue raised initially in a petition for certiorati would be an exercise of original jurisdiction. This Court should not consider an issue raised for the first time in the petition for certiorari. Illinois v. Gates, 462 U.S. 213, 217-224 (1983). Since the petitioner failed to present this issue to the Courts of Tennessee, the petition should be denied.

CONCLUSION

For these reasons, the State of Tennessee submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES W. BURSON
Attorney General & Reporter

C. ANTHONY DAUGHTREY
Assistant Attorney General
(Counsel of Record)

450 James Robertson Parkway
Nashville, Tennessee 37243-0485
(615) 741-4492

Counsel for Respondent

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

AFFIDAVIT OF CERTIFICATE OF SERVICE

I, C. ANTHONY DAUGHTREY, being first duly sworn, make oath that I am a member of the Bar of this Court.

I certify that on this 20th day of August, 1990, I deposited twelve (12) copies of this Response to Petition for Writ of Certiorari in a Unites States mailbox, with first class postage prepaid, properly addressed to the Clerk of this Court, and one (1) copy of this Response to Petition for Writ of Certiorari in a Unites States mailbox, with first class postage prepaid, properly addressed to counsel for petitioner, Mr. Harry P. Ogden, Attorney at Law, 620 Market Street, One Centre Square, Fifth Floor, P.O. Box 2425, Knoxville, Tennessee 37901 (615) 546-4646.

I further certify that all parties required to be served have been served.

C. ANTHONY DAUGHTREY
Assistant Attorney General

Sworn to and subscribed before me
on this 20th day of August, 1990.

NOTARY PUBLIC

My Commission expires: 5/20/92